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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

OLGA SHAPIRO,

Plaintiff and Appellant,

v.

DEPARTMENT OF TOXIC
SUBSTANCES CONTROL,

Defendant and Respondent.

B264432 c/w B266051

(Los Angeles County
Super. Ct. Nos. BS148802 &
PC055727)

APPEAL from judgments of the Superior Court of Los Angeles County.
James C. Chalfant and Stephen P. Pfahler, Judges. Affirmed.

Appell Shapiro, Scott E. Shapiro and Sean J. Haddad, for Plaintiff and
Appellant.

Kamala D. Harris, Attorney General, Sarah E. Morrison, Supervising
Deputy Attorney General, Megan K. Hey and Brian J. Bilford, Deputy
Attorneys General, for Defendant and Respondent.

* * * * *

The state agency responsible for regulating hazardous waste within California fined a person registered to transport such waste for violating several of the statutes and regulations the agency enforces. The waste transporter challenged the agency’s findings in administrative proceedings. The administrative law judge issued a tentative ruling reducing the \$28,500 fine by \$16,500, but the agency ultimately issued a final ruling imposing the full \$28,500 fine. The waste transporter filed two separate lawsuits—one seeking a writ of mandate and another seeking declaratory relief and damages. One trial court denied the writ, and a second trial court sustained a demurrer to the civil suit without leave to amend. We conclude that both trial courts’ rulings were correct, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Since 1991, plaintiff Olga Shapiro (Shapiro) has run a business that picks up used oil from automotive repair shops in the Southern California area and transports that oil to facilities that process used oil. Shapiro operates the business under the fictitious name Pacific Oil Company (Pacific Oil). Pacific Oil sells a large portion of the oil it transports to an Arizona-based company called Botavia Energy, LLC (Botavia). Pacific Oil stores its tanker trucks in a yard in Sun Valley and allows Botavia to store its trucks in the same yard.

Used oil is considered “hazardous waste” within the meaning of California’s Hazardous Waste Control Act (Act), Health and Safety Code sections 25100 through 25259.¹ (§ 25250.4.)² Because Pacific Oil is transporting hazardous waste, it is required by the Act to register with respondent Department of Toxic Substances Control (Department). (§ 25163, subd. (a)(1).) What must be registered is the company itself, not the

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

² Not all used oil qualifies as hazardous waste (e.g., §§ 25143.2, 25250.1 & 25250.3), but none of the statutory carve-outs applies to the used oil transported by Pacific Oil.

company's individual drivers. Pacific Oil is registered with the Department to transport hazardous waste; Botavia is not.

The Department tracks hazardous waste by requiring transporters like Pacific Oil to track each shipment of used oil using a standardized manifest. (§ 25160, subds. (a)(1), (b), (d)(1), (e)(1) & (f); Cal. Code. Regs., tit. 22, § 66263.20, subd. (a).) Our Legislature has delegated to the Department the power to specify how the manifests are to be completed (§ 25160, subds. (b)(1) & (c)(1)), and the Department has issued regulations specifying the applicable procedure. (Cal. Code Regs., tit. 22, §§ 66262.21, 66262.23, 66263.20.)

The transportation of hazardous waste typically involves three entities: the entity that generates the waste (the “generator”); the entit(ies) that transport(s) it (the “transporter(s)”; and the facility designated to receive the waste (the “designated facility”). (Cal. Code Regs., tit. 22, § 66262.21, subd. (d).) All transporters must be registered with the Department, and “it is unlawful for any person to transfer custody of a hazardous waste to a transporter who does not hold a valid registration issued by the [D]epartment.” (§ 25163, subd. (a)(1).) The generator (in this case, the companies wishing to dispose of the used oil) must supply the standardized manifest to a registered transporter, obtain the transporter’s “handwritten signature . . . on the manifest,” retain the detachable copy of the manifest designated for the “generator,” and give the remaining copies of the manifest to the transporter. (§ 25160, subd. (b)(1); Cal. Code Regs., tit. 22, §§ 66262.21, subd. (d), 66262.23, subds. (a), (b), 66263.20, subd. (b).) The transporter must keep the manifest with it as it transports the hazardous waste. (§ 25160, subd. (d)(1); Cal. Code Regs., tit. 22, § 66263.20, subds. (c), (d).) When the transporter delivers the waste to another registered transporter or to the designated facility, it must “obtain . . . the handwritten signature of that transporter or of . . . the designated facility on the manifest,” retain the detachable copy of the manifest designated for the “transporter,” and give the remaining copies of the manifest to the second transporter or the designated facility. (Cal. Code Regs., tit. 22, § 66263.20, subd. (g).) The generator, transporter(s), and designated facility are each then required to submit a copy of their detached copy of the manifest to the

Department. (§ 25160, subd. (b)(1)(D) [generator's duty to submit]; Cal. Code Regs., tit. 22, §§ 66262.23, subd. (a)(4) [same], 66263.20, subd. (f) [transporter's duty to submit]; § 25160, subd. (e)(1) [designated facility's duty to submit].)

For a period of time, Pacific Oil's manifests listed Pacific Oil as the sole "Transporter" and Botavia as the "Designated Facility." Later, more than 1,100 of Pacific Oil's manifests listed Pacific Oil as "Transporter 1," listed Botavia as both "Transporter 2" and as the "Designated Facility," and listed "Alexander De Leon" (De Leon) as the driver for "Transporter 2." In these latter instances, one of Pacific Oil's drivers would pick up the used oil in one of Pacific Oil's marked tanker trucks, drive back to Pacific Oil's yard, and then De Leon would drive the Pacific Oil tanker truck to Botavia's yard in Arizona. De Leon's signature on all 1,100 of these manifests was perfectly identical; this signature was placed on the manifests after the tanker truck arrived in Arizona, *not* when De Leon took custody of Pacific Oil's truck containing the used oil at Pacific Oil's yard.

Consistent with allowing De Leon to drive one of its trucks, Pacific Oil administered its own driving test to De Leon, obtained automobile insurance for De Leon as one of its drivers, signed up for California Department of Motor Vehicles Pull Notices for De Leon to obtain updates on any changes to the status of De Leon's driver license, ensured that De Leon was randomly drug tested, and verified that he passed a fingerprint scan administered by the Transportation Security Administration (TSA).

Shapiro's description of Pacific Oil's employment relationship with De Leon changed over time. At first, she reported that Pacific Oil had a "verbal agreement" with Botavia, under which a "Botavia employee" would haul the used oil to Botavia's yard "using a Pacific Oil truck." Botavia's owner similarly indicated that De Leon "was not an employee of Pacific [Oil]," but noted that Botavia was "helping out" Pacific Oil "with drivers." Consistent with this view, Shapiro named the five drivers Pacific Oil employs and who are on Pacific Oil's payroll, but did not name De Leon among them. Later, Shapiro stated that Pacific Oil had a *written* contract with Botavia that provided that Botavia would "lease" De Leon to Pacific Oil for the purpose of driving Pacific Oil's trucks to Botavia's yard, and that Pacific Oil

compensated De Leon by giving Botavia a discount on the price of the used oil Botavia was buying. Pacific Oil purported to offer a heavily redacted version of that contract (all but two of the 14 pages were blanked out), but the contract was admitted “only for the limited purpose of explaining and corroborating and supplementing [Shapiro’s] testimony that there’s a signed contract between her and Botavia.”

II. Procedural History

A. Enforcement Order

In 2013, the Department served an Enforcement Order upon Shapiro, alleging that Pacific Oil had committed five violations of the Act and assessing a \$28,500 penalty. As pertinent to this appeal,³ the Department alleged that Pacific Oil (1) “failed to obtain the handwritten signature of the transporter or of the owner or operator of the designated facility on the manifest,” in violation of California Code of Regulations, title 22, section 66263.20, subdivision (g)(1); and (2) “transferred custody of a hazardous waste to a transporter who does not hold a valid registration issued by the Department,” in violation of section 25163, subdivision (a)(1).

B. Administrative proceedings

1. Administrative Law Judge’s Proposed Decision

In response to the Enforcement Order, Pacific Oil requested a hearing, and an administrative law judge (ALJ) conducted a two-day evidentiary hearing before issuing a 14-page Proposed Decision. The ALJ affirmed the Department’s finding that Pacific Oil had not obtained De Leon’s “handwritten signature,” agreeing that the “approximately 1,500” “manifests

³ The Department also alleged that Pacific Oil (1) did not submit completed copies of the manifests within 15 days after delivering hazardous waste to the designated facility, in violation of California Code of Regulations, title 22, section 66263.20, subdivision (f); (2) did not submit the annual reports for 2009, 2010, 2011, 2012, and 2013 regarding the used oil transported in those years, in violation of section 25250.10; and (3) did not submit annual reports for 2011, 2012, and 2013 regarding used oil shipped out of state, in violation of section 25250.29, subdivision (f). Those allegations were sustained in the administrative proceedings, and Pacific Oil did not challenge them in the writ proceeding or in this appeal from the writ proceeding.

in question contain a digital version of a handwritten signature from . . . [De Leon] as the transporter on behalf of Botavia” The ALJ further concluded that it was “crucial” that the “handwritten signatures[] be done at the time possession of the used oil is transferred,” and that “it was not established that . . . [De Leon] . . . signed the manifests or affixed the digitized copy of their signatures on the manifests at the time that possession of the used oil was transferred.” The ALJ nevertheless vacated the \$6,000 penalty assessed for this violation because, in his view, Pacific Oil’s noncompliance on 1,100 manifests constituted a “minor” deviation. The ALJ disagreed with the Department’s finding that Pacific Oil had transferred possession of the used oil to Botavia when De Leon drove the used oil in Pacific Oil’s tanker trucks from Pacific Oil’s yard to Botavia’s yard in Arizona. The ALJ reasoned that Shapiro had “leased the Botavia driver to transport the oil . . . , and otherwise accepted responsibility for the leased driver in a manner that demonstrated this arrangement was not a subterfuge.” As proof, the ALJ pointed to Pacific Oil’s acts in insuring De Leon and treating him as one of its drivers, the use of Pacific Oil’s truck, and the written contract. The ALJ accordingly vacated the \$10,500 penalty assessed for this alleged violation.

2. The Department’s Final Decision

Thereafter, the Department issued a Final Decision overturning the ALJ’s conclusions. With respect to the absence of handwritten signatures, the Department reinstated the penalty for Pacific Oil’s failure to obtain De Leon’s contemporaneous, handwritten signature, reasoning that Pacific Oil’s noncompliance on more than 1,100 manifests constituted a “major” deviation from the rule and that the \$6,000 penalty was within the range specified by the Department’s regulations for a “major” deviation from a rule having a “minimal” potential for harm. (Cal. Code, Regs., tit. 22, § 66272.62, subd. (d).). With respect to the transfer to an unregistered transporter, the Department cited the 1,100 manifests that listed Botavia as “Transporter 2” and De Leon’s signature as the driver for “Transporter 2.” In the Department’s view, Shapiro’s “argument that De Leon should be treated as a [Pacific Oil] employee because of measures she had taken in regard to

him . . . cannot outweigh the plain language of the manifests in which [Pacific Oil] represented itself as transferring custody of used oil to Botavia.”

C. Judicial review

1. Writ proceeding

Shapiro then filed a verified petition for a writ of mandate in the Los Angeles County Superior Court, seeking to overturn the Department’s Final Decision. Following briefing and a hearing, the trial court issued a 14-page written order denying the writ. The court reviewed the Department’s Final Decision for substantial evidence. Pacific Oil had urged the court to apply the more onerous “independent judgment” standard of review because, in its view, the Department’s ruling interfered with its fundamental vested right to use leased employees. The court rejected that argument, finding that Pacific Oil “provided no evidence as to how long it has engaged in leasing drivers, or that being unable to do so will severely disrupt or drive it out of business.”

On the merits, the trial court found substantial evidence to support the Department’s findings of violations and its assessment of penalties. The court found that De Leon did not hand sign his signature at the time the used oil was transferred to him, and that the \$6,000 penalty was appropriate because the 1,100 violations constituted a “major” deviation from the Department’s regulations. The court also rejected Pacific Oil’s argument that the federal E-SIGN Act (15 U.S.C. § 7001(a)) preempted the Department’s requirement that signatures be “handwritten.” The E-SIGN Act prohibits a state from denying legal effect to a contract or signature “*solely* because it is in electronic form,” but the court reasoned that the Department’s imposition of a penalty did not run afoul of this prohibition because the penalty was being assessed for noncompliance with the “require[ment] that the signature occur at the time of transfer,” not *solely* because it was not handwritten. The court further found that Pacific Oil’s designation of Botavia as a second transporter in over 1,100 manifests constituted substantial evidence to support the Department’s finding that De Leon was working for Botavia as a second transporter (rather than working for Pacific Oil as a leased employee). The court rejected Pacific Oil’s argument that De Leon was its employee as a matter of law, explaining that Pacific Oil’s “mere assurance that all drivers were properly licensed, insured, and TSA cleared, coupled with a discount to

Botavia for the use of its driver employees does not make . . . De Leon its employee.”

The trial court entered judgment.

2. *Civil action*

Two weeks after filing the petition for a writ of mandate, Pacific Oil filed a complaint for declaratory relief, injunctive relief and damages in a different department of the Los Angeles County Superior Court. In the operative first amended complaint (FAC), Pacific Oil recounted in detail the administrative proceedings before the ALJ and the Department, quoting verbatim from the Proposed and Final Decisions. Pacific Oil alleged that it “always had, and continues to have, the right to use leased drivers,” that the Department “has sought to deprive [Pacific Oil] of vested and fundamental rights concerning the use of qualified leased drivers,” and that “[t]he actual evidence and testimony at the Evidentiary Hearing clearly supported the ALJ’s determination that there was no transfer of custody [of used oil] to an unregistered company.” The FAC pled four claims: (1) declaratory relief; (2) violation of due process and equal protection under the California Constitution; (3) trade libel; and (4) intentional interference with contractual relations. As to the first claim, Pacific Oil sought a declaration that (a) the Department had “no authority to regulate drivers,” (b) Pacific Oil “may use qualified leased drivers to drive [its] trucks,” and (c) “[t]he use of leased drivers while driving [Pacific Oil’s] trucks does not constitute an unlawful transfer of custody of hazardous waste.”⁴ As to the remaining claims, Pacific Oil sought damages between \$75,000 and \$1 million.

The Department demurred to the FAC and moved to strike the damages allegations from Pacific Oil’s claim for violations of the California Constitution.

⁴ Pacific Oil also sought a declaration that the Department erred in publishing its Enforcement Order on its website before the administrative proceedings adjudicating that order were completed, and relied upon the same allegation as the basis for its trade libel and intentional interference with contractual relations claims. Pacific Oil does not contest the trial court’s resolution of the publication issue in this appeal, so we will not discuss it further.

The trial court sustained the demurrer without leave to amend and consequently declared the motion to strike moot. As to the demurrer, the court ruled that Pacific Oil's declaratory relief claim was "an improper challenge to [the Department's] administrative decision" because Pacific Oil's challenge to the Department's "authority to regulate the use of 'leased drivers' is the same challenge to [the Department's] administrative decision [that Pacific Oil] made in its writ of mandate." Pacific Oil's "exclusive remedy," the court ruled, was the pending writ proceeding. The court next ruled that Pacific Oil had not alleged a claim for violations of the California Constitution because the FAC's allegations demonstrated that the Department had followed the statutory procedures for administrative review and had not "committed the type of 'egregious and outrageous' conduct necessary to state a [cause of action] for a substantive due process violation." The court lastly rejected Pacific Oil's trade libel and intentional interference with a contract claims on grounds that are not challenged in this appeal.

The trial court entered an order of dismissal.

3. Appeal

Pacific Oil appealed both trial court orders, and we consolidated the two appeals.

DISCUSSION

I. Appeal in Writ Proceeding

In its appeal in the writ proceeding, Pacific Oil makes two arguments. First, it contends that the trial court erred in reviewing the Department's Final Decision for substantial evidence rather than exercising its "independent judgment" in evaluating that decision. Second, Pacific Oil asserts that, even if substantial evidence review is appropriate, the Department's Final Decision does not clear even that lower hurdle.

A. Standard of review

A person aggrieved by the "final administrative order or decision" made after an administrative hearing may seek a writ of mandate. (Code Civ. Proc., § 1094.5, subd. (a).) That person is entitled to the issuance of a writ overturning the administrative agency's determination if she can establish (1) that the agency acted "without, or in excess of, jurisdiction," (2) that she was not accorded "a fair trial," or (3) that "there was [a] prejudicial abuse of

discretion” because the agency did “not proceed[] in the manner required by law,” because its “order or decision is not supported by the findings,” or because “the findings are not supported by the evidence.” (*Id.*, subd. (b).) Generally, a trial court determining whether to issue a writ on the ground that the administrative agency’s findings are not supported by evidence is to assess whether “the findings are . . . supported by substantial evidence in the light of the whole record.” (*Id.*, subd. (c).) However, the court may, in the alternative, “exercise its independent judgment on the evidence” where it is “authorized by law” to do so. (*Ibid.*) A trial court’s selection of which standard of review to employ—substantial evidence or independent judgment—is a question of law that we, as an appellate court, review de novo. (E.g., *In re Marriage of Ruiz* (2011) 194 Cal.App.4th 348, 353-354 [selection of appropriate rule to apply is a question of law reviewed de novo]; accord, *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058 (*JKH Enterprises*) [evaluating standard of review to apply on writ review without any deference to trial court’s selection].)

A trial court evaluating an administrative writ of mandate is authorized to exercise its independent judgment when the agency’s decision involves, or substantially affects, a “fundamental vested right” of the party seeking review. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-144 (*Bixby*).) This determination is to be made on a “case-by-case basis” (*id.* at p. 144), except in those instances in which our Legislature has exercised its authority by crafting a categorical rule dictating which standard of review to apply. (*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 346.) In the usual case, a court assessing whether a specific right is “fundamental” looks to “(1) the character and quality of its economic aspect; [and/or] (2) the character and quality of its human aspect.” (*Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 780; accord, *Bixby*, at p. 144 “[i]n determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation”].) In assessing whether a right is “vested,” courts are to examine “the degree to which that right is . . . already possessed by the individual” rather than “merely sought by him.” (*Bixby*, at pp. 144, 146.) “Independent

judgment” review is limited to administrative decisions involving or substantially affecting fundamental vested rights because, in such instances, “[t]he abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction.” (*Id.* at p. 144.)

“[A]s a general rule, when a case involves or affects purely economic interests, courts are far less likely to find a right to be of the fundamental vested character.” (*JKH Enterprises, supra*, 142 Cal.App.4th at p. 1060; *Ogundare v. Department of Industrial Relations* (2013) 214 Cal.App.4th 822, 828 (*Ogundare*).) As a result, an administrative decision is not likely to affect a fundamental vested right just because it increases the costs of doing business, reduces a business’s profits, or restricts a property owner’s return on her property. (*E.W.A.P., Inc. v. City of Los Angeles* (1997) 56 Cal.App.4th 310, 325-326 (*E.W.A.P.*).) Conversely, an administrative decision will be deemed to affect a fundamental vested right if the right is “crucial to [the] plaintiff’s economic viability” (*San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1897 (*San Benito Foods*)), or if the agency’s decision will “drive[]” the plaintiff to “financial ruin” (*Standard Oil Co. v. Feldstein* (1980) 105 Cal.App.3d 590, 604 (*Standard Oil*)) or otherwise “shut[] down” her business (*The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 407 (*Termo*)).

The cases applying this standard have by and large adhered to these guideposts. Courts have engaged in independent judgment review where an administrative decision revokes, suspends or restricts a person’s license to carry out the profession that is her livelihood (e.g., *Owen v. Sands* (2009) 176 Cal.App.4th 985, 991-992; *San Benito Foods, supra*, 50 Cal.App.4th at p. 1897; *Endler v. Schutzbank* (1968) 68 Cal.2d 162, 165 [administrative findings regarding plaintiff’s criminal acts that preclude his hire by other employers]); docks an employee’s pay or takes disciplinary action that will be placed on his “permanent record” (*Estes v. City of Grover City* (1978) 82 Cal.App.3d 509, 511, 514-515 [suspension]; *Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 315-316 [official reprimand]); or otherwise shuts down or drives a business into financial ruin (*Termo, supra*, 169 Cal.App.4th at pp. 398, 406-408 [revocation of right to operate oil wells that would “shut[] down” business]; *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1529-1530 [refusal to renew conditional use permit that would deprive

plaintiff of “all right to continue in business”)). Conversely, courts have engaged in substantial evidence review where the administrative decision increases the cost of doing business or imposes other hardships that are not economically crippling. (See, e.g., *JKH Enterprises, supra*, 142 Cal.App.4th at pp. 1061-1062 [decision requires plaintiff to purchase workers’ compensation insurance]; *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 296-297, 305 (*Mobil Oil*) [decision requires plaintiff to install vapor lock devices on gas pumps]; *E.W.A.P., supra*, 56 Cal.App.4th at pp. 325-326 [decision restricts hours plaintiff may operate its business]; *Ogundare, supra*, 214 Cal.App.4th at p. 829 [decision temporarily bars plaintiff from bidding for public (but not private) contracts]; *Standard Oil, supra*, 105 Cal.App.3d at pp. 594, 604-605 [decision caps the number of refinery units plaintiff may operate at a time].) Administrative fines typically fall into this latter category. (E.g., *Handyman Connection of Sacramento, Inc. v. Sands* (2004) 123 Cal.App.4th 867, 871, 880; *Owen*, at p. 992.)

In this case, the Department imposed a \$28,500 fine on Pacific Oil, and Pacific Oil has not presented any evidence indicating that payment of this fine will cause it to shut down or drive it into financial ruin. As a result, the trial court properly engaged in substantial evidence review.

Pacific Oil resists this conclusion on two grounds. First, Pacific Oil seems to suggest that it is automatically entitled to independent judgment review because the Department overturned the ALJ’s ruling and thereby anointed itself “judge, jury, and executioner.” We disagree. The Act specifically grants persons assessed a penalty by the Department the right to seek a hearing before an ALJ, and incorporates by reference California’s Administrative Procedure Act. (§ 25187, subd. (e); see generally Gov. Code, § 11400 et seq.) Critically, the Act goes on to provide that “the [D]epartment shall have all the authority granted to an agency by” the Administrative Procedure Act. (§ 25187, subd. (e).) The Administrative Procedure Act, for its part, grants an agency the power to “[r]eject the proposed decision” of an ALJ, “and decide the case upon the record, . . . with or without taking additional evidence.” (Gov. Code, § 11517, subd. (c)(2)(E).) What is more, courts have repeatedly held that an agency’s power to reject the ALJ’s decision and to adopt a contrary final decision is consistent with due process.

(E.g., *Hoang v. California State Bd. of Pharmacy* (2014) 230 Cal.App.4th 448, 454 (*Hoang*); *Gore v. Bd. of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 190 (*Gore*)). Because the governing statutes expressly contemplate precisely what the Department did in this case, the Department's rejection of the ALJ's decision provides no basis to ignore the traditional, case-by-case approach to evaluating whether independent judgment review is warranted.

Second, Pacific Oil argues that it is entitled to independent judgment review under the traditional test. It offers several reasons. To begin, Pacific Oil asserts the Department's decision infringes upon its fundamental right, secured by numerous statutes, to hire anyone it wants, including leased employees. (49 C.F.R. §§ 391.1, 391.63 [federal regulations contemplating drivers working for multiple employers]; Bus. & Prof. Code, § 16600 [barring contracts restraining persons from engaging in a lawful profession, trade or business]; Lab. Code, § 96, subd. (k) [authorizing Labor Commissioner to assume prosecution of an employee's claim for loss of wages as the result of discipline imposed for conduct during nonworking hours, such as moonlighting].) However, this argument misapprehends the basis for the Department's ruling: The Department did not rule that Pacific Oil *cannot* hire leased employees; instead, it ruled that De Leon was not shown to be one *in this case*. Its ruling therefore does not encroach upon Pacific Oil's right to hire leased employees.

Next, Pacific Oil argues that it is merely the name under which Shapiro, as an individual, does business, thereby rendering any impact on Pacific Oil a "human impact" on her. (*Bixby, supra*, 4 Cal.3d at p. 144.) To the extent Pacific Oil is contending that Shapiro's decision to organize and operate Pacific Oil as a sole proprietorship (rather than a corporation or in some other form) automatically establishes an impact qualifying for treatment as a fundamental right, we reject this argument because it would give dispositive weight to a business's organizational form irrespective of the actual impact on the business or on the people behind it. (E.g., *JKH Enterprises, supra*, 142 Cal.App.4th at pp. 1061-1062; *Mobil Oil, supra*, 59 Cal.App.3d at pp. 296-297, 305.) To the extent Pacific Oil is urging that the "human impact" of the Department's ruling on Shapiro is egregious enough qualify as a fundamental right, Pacific Oil has not adduced any evidence to

support that assertion, as the record is devoid of any evidence of Shapiro's financial wherewithal (and hence of any evidence regarding the impact of the penalty on her as an individual).

Further, Pacific Oil contends that the Department's finding of administrative violations and its imposition of a penalty will adversely affect Pacific Oil's reputation, thereby threatening its ability to remain operational. Pacific Oil has produced no evidence to support this argument. What is more, if reputational harm were enough by itself to warrant independent judgment review, then such review would apply in effectively every administrative writ proceeding. This would not only jettison the longstanding test for evaluating the standard of review that turns on whether the administrative decision affects a fundamental vested right, but would also cause the exception for independent judgment review to swallow the general rule of substantial evidence review.

Lastly, Pacific Oil argues that it is unfair to penalize it for transferring hazardous waste to Botavia because Botavia, as an Arizona-based company, cannot register in California. On its face, this argument appears to have nothing to do with whether the Department's decision deprives *Pacific Oil* of a fundamental vested right. Even if we ignore its irrelevance, it is also legally incorrect. If, as the Department found, Botavia is transporting hazardous waste in California, it is able to—and indeed, required to—register as a transporter of hazardous waste in California, even if its processing facility is located elsewhere. (§ 25163, subd. (a)(1).)

For these reasons, the trial court properly applied the substantial evidence test.⁵

⁵ Because substantial evidence review is appropriate under the traditional test, we have no occasion to decide whether section 25187, subdivision (i) constitutes a legislative “carve-out” dictating substantial evidence review in all writs reviewing Department orders. (§ 25187, subd. (i) [“A decision issued pursuant to this section may be reviewed by the court pursuant to Section 11523 of the Government Code. In all proceedings pursuant to this section, the court shall uphold the decision of the [D]epartment . . . if the decision is based upon substantial evidence in the whole record.”].)

B. Merits

Where, as here, the trial court properly engaged in substantial evidence review, our “function is identical” to the trial court’s—that is, we “review[] the administrative record to determine whether the agency’s findings were supported by substantial evidence,” “beginning with the presumption that the record contains evidence to sustain [those] findings of fact” and “resolving all conflicts in the evidence and drawing all inferences in support of [those findings].” (*JKH Enterprises, supra*, 142 Cal.App.4th at p. 1058; *TG Oceanside, L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1370-1371.) If there is evidence that is “reasonable in nature, credible, and of solid value” sufficient that “a reasonable mind might accept [it] as adequate to support a conclusion,” our job is done and we must affirm the agency’s action. (*TG Oceanside*, at p. 1371.) To the extent an issue of law is involved, our review of that issue is de novo. (*Ibid.*) And we review any penalty imposed for an abuse of discretion and will not disturb it unless it is ““arbitrary, capricious or patently abusive.”” (*Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 627-628 (*Cassidy*).)

1. Failure to obtain handwritten signatures

Pacific Oil argues that the Department erred in (1) finding that it did not obtain handwritten signatures from De Leon, and (2) imposing a \$6,000 penalty.

a. Substantial evidence supports the finding that Pacific Oil did not obtain the “handwritten signature” of De Leon

The Department found that Pacific Oil had not “obtain[ed] . . . the handwritten signature of the transporter [to whom it transferred the used oil] . . . on the manifest,” in violation of California Code of Regulations, title 22, section 66263.20, subdivision (g). Substantial evidence supports this finding, as De Leon’s signature on 1,100 manifests was identical. Indeed, both the ALJ and the Department agreed that De Leon’s signature was applied digitally long after the transfer of used oil occurred.

Pacific Oil mounts two challenges to this conclusion. First, it argues that the federal E-SIGN Act preempts California Code of Regulations, title 22, section 66263.20, subdivision (g)’s requirement that Pacific Oil obtain a handwritten signature. We disagree. As pertinent here, the E-SIGN Act provides that, as to “any transaction in or affecting interstate or foreign

commerce” and “[n]otwithstanding any statute, regulation, or other rule of law,” “a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability *solely because it is in electronic form.*” (15 U.S.C. § 7001(a)(1), italics added.)⁶ As the ALJ, the Department and the trial court all concluded, the Department’s regulations specifying how manifests tracking hazardous substances are to be filled out make sense only if the transporter obtains the generator’s handwritten signature at the time it picks up the hazardous waste and obtains the next transporter’s or designated facility’s handwritten signature at the time it hands off that waste. (§ 25160, subd. (b)(1); Cal. Code Regs., tit. 22, §§ 66262.21, subd. (d), 66262.23, subds. (a), (b), 66263.20, subds. (b), (g).) Pacific Oil is accordingly incorrect when it argues that California Code of Regulations, title 22, section 66263.20 does not require the handwritten signature to be affixed to the manifest at the time the hazardous waste is changing hands. The requirement of a contemporaneous, “handwritten signature” is significant and important because it assures “that the signer, at the time of signing, has actually affirmed” the transfer. (*Ni v. Slocum* (2011) 196 Cal.App.4th 1636, 1646 [so noting, with respect to contemporaneous “personally affix[ed]” signatures on petitions for placing initiatives on the ballot].) As a result, De Leon’s after-the-fact digitized signature was denied effect because it was not handwritten *and* because it was not contemporaneous with the transfer of hazardous waste, not “solely because it [was] in electronic form.” The signature requirement accordingly does not run afoul of the E-SIGN Act.

Second, Pacific Oil asserts that the Department lacks jurisdiction to sanction it for not obtaining De Leon’s signature because it is undisputed that De Leon did not sign the manifests in California, and the Department admits it lacks jurisdiction over out-of-state conduct. This argument ignores

⁶ Our Legislature has enacted the Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.), which has a similar provision (Civ. Code, § 1633.7), but which is inapplicable here because it only applies where the parties have “agreed to conduct [a] transaction by electronic means” (Civ. Code, § 1633.5, subd. (b); *Fresno Motors, LLC v. Mercedes Benz USA, LLC* (9th Cir. 2014) 771 F.3d 1119, 1129-1130).

that Pacific Oil, as explained above, was required to obtain De Leon's handwritten signature at the time it handed over the used oil to De Leon, and that this transfer occurred, as we conclude by affirming the Department's findings regarding De Leon's employer, *in California*. Thus, Pacific Oil's violations occurred in California and are well within the Department's territorial jurisdiction.

b. Penalty

The Department imposed a \$6,000 penalty for Pacific Oil's failure to obtain De Leon's handwritten signature on more than 1,000 invoices at the time it transferred used oil to Botavia for transport. The Department's discretion for imposing penalties is limited by California Code of Regulations, title 22, section 66272.62. That provision directs the Department to examine both the "degree of potential harm" caused by the violation and the "extent of deviation of the violation," and to categorize each as "major," "moderate," or "minimal." (Cal. Code Regs., tit. 22, § 66272.62, subds. (b), (c).) The provision also has a matrix setting forth the minimum and maximum penalty range for each variation of potential harm and extent of deviation, along with the arithmetic midpoint penalty. (*Id.*, subd. (d).) With respect to Pacific Oil's violation of the contemporaneous handwritten signature requirement, the Department concluded that the "degree of potential harm" was "minimal," but that the "extent of deviation of the violation" was "major" in light of more than 1,000 violations. For this combination, the matrix prescribes a minimum penalty of \$6,000 and maximum penalty of \$15,000. The Department selected the minimum penalty.

Pacific Oil attacks the Department's conclusion that the extent of its deviation is "major," arguing that it made a "good faith effort to comply with the requirement" and "substantially compl[ied]" with it. Pacific Oil handed off the hazardous waste to De Leon 1,100 times without obtaining his actual signature at the time of transfer; Pacific Oil did not try to comply with the requirement, nor did it substantially comply with it. Instead, Pacific Oil ignored the requirement day in and day out, week in and week out, month in and month out, for years. Consequently, the Department did not act in an arbitrary, capricious or patently abusive manner when it found that Pacific

Oil's deviation from the rule was major. (*Cassidy, supra*, 220 Cal.App.4th at pp. 627-628.)

2. *Delivering used oil to an unauthorized transporter*

The Department found that Pacific Oil “transferred custody of hazardous waste to a secondary transporter”—namely, Botavia—“who [does] not hold a valid registration issued by the Department,” in violation of section 25163, subdivision (a)(1). Pacific Oil contends that substantial evidence does not support this finding because De Leon was *Pacific Oil's* leased employee, not solely Botavia's employee; as a result, Pacific Oil never transferred the used oil to Botavia, and was wrongly penalized for doing so.

The evidence presented to the ALJ on who was employing De Leon at the time he transported the used oil at issue—and thus on whether there was a transfer of hazardous waste from one transporter to another—was conflicting. There was evidence to support a finding that Pacific Oil was leasing De Leon from Botavia—namely, Pacific Oil ran him through its driving tests; insured him; and undeniably took efforts to ensure he was properly licensed to drive and was sober while doing so. Pacific Oil also presented Shapiro's testimony that De Leon was Pacific Oil's leased employee and a heavily redacted snippet of a written contract so indicating. But there was also evidence to support a finding that De Leon was solely a Botavia employee, and not a leased driver for Pacific Oil—namely, the 1,100 manifests filled out by Pacific Oil indicating that Botavia was the second transporter and that De Leon was the second transporter's driver; and Shapiro's earlier statements that a “Botavia employee” was hauling the used oil “using a Pacific Oil truck.”

In reviewing a decision for substantial evidence, we are not allowed to reweigh the evidence (*In re R.V.* (2015) 61 Cal.4th 181, 217 (dis. opn. of Chin, J.)) and, more to the point, we must resolve all conflicts in favor of the underlying decision (*JKH Enterprises, supra*, 142 Cal.App.4th at p. 1058). In light of the conflicting evidence, we are compelled to conclude that substantial evidence supports the Department's finding that De Leon was solely Botavia's employee and not Pacific Oil's leased employee and, as a result, that Pacific Oil transferred hazardous waste to an unregistered transporter (namely, Botavia).

Pacific Oil assails this logic with two categories of arguments. First, Pacific Oil contends that a remand is required because the Department did not employ the common law, multifactor test for assessing whether a person is an employee or an independent contractor. (See, e.g., *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 873-875.) We are unpersuaded. As an initial matter, it is unclear why *this* test should be employed to assess whether De Leon was Pacific Oil's leased employee, particularly when Pacific Oil seems to suggest (1) in its reply brief and without any legal citation, that De Leon need not even be an employee and needed only to have been "authorized" by Pacific Oil to drive its trucks; and (2) at oral argument and without any legal citation, that De Leon need only be driving a Pacific Oil truck. However, even if we applied the common law employment test, it is clear that "most significant factor in determining whether the status of a person performing services for another is an employee or an independent contractor is the right to control the manner and means of accomplishing the result, that is, the details of the work." (*Toyota*, at p. 873.) Although there is evidence that Pacific Oil required De Leon to pass a driving test at the outset, insured him, and verified on an ongoing basis that he was a sober driver with a valid license, Pacific Oil introduced no evidence that it in any way controlled how De Leon performed his job of transporting the used oil. Pacific Oil asserts such evidence exists, but provides no citation to that evidence and none appears in the record.

Second, Pacific Oil asserts that the manifests and Shapiro's initial statements are not sufficient evidence to support the Department's finding. With respect to the manifests, Pacific Oil argues that they are "confusing technical forms," and that Pacific Oil cannot be held responsible for how it filled them out. This argument is, in a word, disingenuous. By the time of the transactions challenged by the Department, Pacific Oil had been in the business of transporting used oil for nearly 20 years. Its claim that it did not understand the standardized manifest forms it had been filling out for decades is unsupported by any evidence in the administrative record; it also defies credulity. Pacific Oil further asserts that the manifests' designation of De Leon as Botavia's employee is just a label, and labels are not dispositive of a person's employment status. This is true (*Performance Team Freight*

Systems, Inc. v. Aleman (2015) 241 Cal.App.4th 1233, 1243), but ignores that labels are still persuasive evidence (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1181). Indeed, in *Eye v. Kafer, Inc.* (1962) 202 Cal.App.2d 449, 453, the court looked to how the employer characterized a person in concluding that the employer's characterization was accurate. Pacific Oil additionally argues that Botavia's designation as the second transporter on the 1,100 manifests is nothing more than a recognition that De Leon transforms from transporter for Pacific Oil into a transporter for Botavia once he crosses the California-Arizona border. But if this were true, there would be no need to list Botavia *at all* because the Department does not regulate out-of-state transportation of hazardous waste. This reading is also contradicted—and thus, for purposes of substantial evidence review, refuted—by the statements of Shapiro and of Botavia's owner indicating that Botavia was taking custody of the used oil at Pacific Oil's yard. With respect to Shapiro's initial statements, Pacific Oil argues that they are "neither statements . . . nor evidence." We disagree. What Shapiro stated were most certainly her "statements," and they were evidence because they were admitted before the administrative tribunal; what is more, they were properly admitted as statements of a party opponent. (Evid. Code, § 1220.)⁷

II. Appeal in Civil Proceeding

In its appeal in the civil proceeding, Pacific Oil argues that the trial court erred in finding that it had not stated viable claims for declaratory relief or for violations of the equal protection and due process guarantees of the California Constitution, and in declining to give Pacific Oil leave to amend the FAC. In evaluating an order sustaining a demurrer, we independently assess whether the operative complaint states facts sufficient to state a cause of action. (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 34.) In making this assessment, we look to the facts properly alleged in the operative complaint and accept them as true except when they conflict with matters properly subject to judicial notice. (*Ibid.*;

⁷ Pacific Oil also points to a number of other perceived irregularities in the Department's investigation, but it does not explain why these irregularities have any bearing on the Department's ultimate ruling. We conclude they have none.

Tucker v. Pacific Bell Mobile Services (2012) 208 Cal.App.4th 201, 210.) In evaluating whether a trial court abused its discretion in denying leave to amend, we ask “whether there is a reasonable probability that the defect can be cured by amendment.” (*Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 128, 163.) We must consider new theories advanced for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a).)

A. Failure to state a claim

1. Declaratory relief

A person may bring a claim for declaratory relief, “in cases of actual controversy,” to obtain a judicial “declaration of his or her rights or duties with respect to another.” (Code Civ. Proc., § 1060.) Declaratory relief “is designed in large part as a practical means of resolving controversies.” (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 648.) Courts accordingly have “considerable discretion” not to issue such relief “in any case where its declaration or determination is not necessary or proper at the time under all the circumstances.” (Code Civ. Proc., § 1061; *Meyer*, at p. 648; *Guinn v. County of San Bernardino* (2010) 184 Cal.App.4th 941, 951 (*Guinn*).)

Of critical importance here and consistent with its purpose, “declaratory relief is unavailable” “[w]hen a remedy has been designated by the Legislature to review an administrative action.” (*County of Los Angeles v. State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985, 1002; *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 249 [“[i]t is settled that an action for declaratory relief is not appropriate to review an administrative decision”]; *Scott v. Indian Wells* (1972) 6 Cal.3d 541, 546 [“[a]n action for declaratory relief may not be used to attack an administrative order”]; *Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 287 [same]; *Hostetter v. Alderson* (1952) 38 Cal.2d 499, 500 [“[a]n action for declaratory relief is not appropriate for review of an administrative order”]; see also *Agins v. Tiburon* (1979) 24 Cal.3d 266, 272-273 [mandamus is “sole remedy”]; *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718 (*City of Santee*) [mandamus is “exclusive remedy for judicial review”]; cf. *Guinn*, *supra*, 184 Cal.App.4th at pp. 944, 950 [where there is no alternative remedy available for reviewing administrative action, declaratory relief is

appropriate].) In such instances, dismissal of the declaratory relief claim on a demurrer is appropriate. (*Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 155; *Veta*, at p. 249.)

As explained above, our Legislature has specifically provided for review of the Department’s administrative actions through a writ of mandate. (§ 25187, subd. (i) [authorizing review under Government Code section 11523]; Gov. Code, § 11523 “[j]udicial review may be had by filing a petition for a writ of mandate”].) What is more, Pacific Oil’s claim for declaratory relief seeks review of the Department’s Final Decision. That is because all three judicial declarations Pacific Oil seeks would directly or indirectly invalidate the Department’s Final Decision. Two of the declarations—namely, that the Department lacks authority to regulate drivers and that Pacific Oil may use qualified leased drivers—assail the Department’s factual finding that De Leon was not Pacific Oil’s leased employee. And the third declaration—namely, that “[t]he use of leased drivers while driving [Pacific Oil’s] trucks does not constitute an unlawful transfer of custody of hazardous waste”—is a frontal assault on the Department’s ultimate legal and factual determination that Pacific Oil had unlawfully “transferred custody of hazardous waste to a secondary transporter.” Because Pacific Oil’s declaratory relief action constitutes an impermissible “end run” around the legislatively authorized writ of mandate, and because any judge ruling on such an action would be impermissibly reviewing the ruling of the judge in the writ proceeding (*In re Alberto* (2002) 102 Cal.App.4th 421, 427-428), the trial court properly sustained the Department’s demurrer to this claim.

Pacific Oil responds with what amounts to four arguments.

First, Pacific Oil asserts in its reply brief that two of the cases setting forth the general rule against using declaratory relief to review an administrative proceeding when a remedy by writ is already available—*Veta* and *City of Santee*—did not actually follow that rule and instead rested on “grounds similar to waiver or estoppel.” In both of those cases, the plaintiffs who lost before administrative tribunals tried to challenge those proceedings by filing declaratory relief claims rather than seeking a writ of administrative mandamus; *Veta* and *City of Santee* held that this was improper, explaining that the plaintiffs’ “failure to contest” the

administrative action “by the means provided for judicial review through administrative mandamus estops [them] from relitigating the same issue” via declaratory relief. (*City of Santee, supra*, 228 Cal.App.3d at pp. 718-719; *Veta, supra*, 12 Cal.3d at p. 249.) These cases refer to estoppel and waiver—not as a separate, independent basis for their rulings—but as the very rationale for the general rule against the use of declaratory relief to circumvent administrative mandamus. To the extent Pacific Oil is arguing that the rationale for the general rule conflicts with and thus negates the rule itself, we reject that argument as nonsensical. Pacific Oil relatedly seems to suggest that the general rule should not apply to it because it, unlike the plaintiffs in *Veta* and *City of Santee*, filed *both* a declaratory relief action *and* an administrative writ. However, we do not see why a plaintiff’s attempt to get two bites at the apple on an issue on which it had lost administratively is any less offensive to the concern that parties not do an “end run” around administrative mandamus review than a plaintiff who tries to get just one bite in the wrong forum.

Second, Pacific Oil argues that it is not actually attacking the Department’s Final Decision; instead, it claims it is merely attacking the Department’s policy of regulating individual drivers rather than registered transporters, its policy of not recognizing the lawful practice of using leased employees as drivers, its policy of refusing to use the common law, multifactor test for assessing whether a person is an “employee,” and its policy of making “sua sponte, ad-hoc and post-hoc legal determinations.” Although, as noted above, declaratory relief may not be used to obtain “review of specific, discretionary administrative decisions” when our Legislature has specified an alternative mechanism for review, a person who happens to be a party to an administrative proceeding may still invoke the declaratory relief statute to obtain a declaration that “a generalized agency policy” “violat[es] . . . statutory mandates.” (*Californians for Native Salmon Etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1428-1429 (*Californians for Native Salmon*); *In re Claudia E.* (2008) 163 Cal.App.4th 627, 633-634 [“judicial economy strongly supports the use of declaratory relief . . . to challenge an agency’s . . . alleged policies”].)

However, Pacific Oil’s claim for declaratory relief does not fit within this exception for two reasons. To begin, all three declarations Pacific Oil seeks in the FAC would, as noted above, either explicitly or implicitly “review [the] specific, discretionary administrative decision[]” of the Department. (*Californians for Native Salmon, supra*, 221 Cal.App.3d at p. 1429.) Pacific Oil’s attacks on the reasoning contained in the Department’s Final Decision—namely, its failure to use the definition of employee that Pacific Oil prefers and its alleged resort to “sua sponte, ad-hoc and post-hoc legal determinations”—also call into question the Department’s specific decision in this case. Furthermore, and more to the point, the Department’s Final Decision—of which the trial court and we take judicial notice—definitively refutes Pacific Oil’s argument that the Department has a “policy” of regulating the drivers used by hazardous waste transporters or a “policy” against letting transporters employ leased employees. Instead, the Department concluded that the evidence presented at the evidentiary hearing did not show, *on the facts of this case*, that De Leon was Pacific Oil’s leased employee.⁸ As a result, there is no Department policy regarding drivers generally or leased drivers specifically, and thus no “actual controversy” warranting declaratory relief. (See, e.g., *Market Lofts Community Assn. v. 9th Street Market Lofts, LLC* (2014) 222 Cal.App.4th 924, 931 (*Market Lofts*) [operative complaint must “show[] the existence of an actual controversy”].)

Third, Pacific Oil contends that this case is analogous to *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, where the Court of Appeal held that a party did not have to proceed by way of a writ of mandate in attacking the actions of an administrative agency. *California American Water* is distinguishable. There, a trial court had issued an order settling the competing rights of various entities, including a water management district, in the extraction of groundwater from a basin, and had reserved jurisdiction to interpret, implement or enforce its order. (*Id.* at pp. 473-477.) When two of the parties who participated in the earlier litigation subsequently applied to the water management district for access to some of

⁸ In our discussion of Pacific Oil’s writ, we have rejected its argument that the Department’s factual findings were unsupported by substantial evidence.

the water in the basin and their application was denied, those parties filed an action for declaratory relief regarding the interpretation and implementation of the earlier court order. (*Id.* at pp. 477-478.) The water management district asserted that the parties were limited to a writ of mandate. On these circumstances, the *California American Water* court disagreed, reasoning that the declaratory relief action addressed the scope of the earlier court order over which the court had retained jurisdiction, and “did not call for a ruling on the merits of the underlying application” to the water management district. (*Id.* at p. 479.) This case is different: There is no prior court order over which a court retained jurisdiction; there is just the administrative proceeding, which Pacific Oil’s declaratory relief claim directly assails.

Fourth, Pacific Oil raises a number of subsidiary arguments. It cites the maxim that “doubts regarding the propriety of a declaratory judgment are generally resolved in favor of the plaintiff.” (*Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 776.) However, we have no doubts; Pacific Oil is most certainly *not* entitled to declaratory relief under the solid wall of precedent cited above. Pacific Oil points to the maxim that a ““court should declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to [a] favorable declaration. [Citations.]”” (*Market Lofts, supra*, 222 Cal.App.4th at p. 931.) However, Pacific Oil is not being denied declaratory relief because its claim might or might not lack substantive merit; it is being denied declaratory relief because that relief is not procedurally available in light of the availability of review by administrative mandamus. Pacific Oil lastly suggests that its declaratory relief action should be viewed as independent of the writ of mandate, even though many of its allegations “stem from the administrative record,” because Pacific Oil has taken care not to include the [a]dministrative [r]ecord in the record on appeal of the civil action. We do not see how omitting the administrative record alters the gravamen of Pacific Oil’s claims.

2. *State constitutional claims*

The California Constitution guarantees that “[a] person may not be deprived of life, liberty, or property without due process of law or [be] denied equal protection of the laws.” (Cal. Const., art I, § 7.) Due process has a procedural and a substantive component. Procedural due process secures the

right to receive “reasonable notice . . . , notice of the time and place of a hearing, . . . and thereafter a fair hearing” (E.g., *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 636-637.) Substantive due process assures that the government will not engage in “conduct that is in some sense outrageous or egregious—a trust abuse of power”; “ordinary government error” is not enough. (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1032.) Equal protection guarantees that “persons who are similarly situated with respect to the legitimate purpose of a law must be treated alike under the law” absent a “rational basis” for treating them differently. (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 857-858.)

Pacific Oil has not stated a claim for relief under any of these theories.

Pacific Oil has not stated a claim for a violation of procedural due process because the Enforcement Order was litigated using the procedures set forth in our State’s Administrative Procedure Act (Gov. Code, § 11400 et seq.), and compliance with those procedures satisfies procedural due process as a matter of law (*Hoang, supra*, 230 Cal.App.4th at pp. 454-455; *Gore, supra*, 110 Cal.App.3d at p. 190). Pacific Oil asserts that the two cases affirming the constitutional validity of the Administrative Procedure Act did so in the context of cases that went on to review the agency’s action using independent judgment rather than for substantial evidence. This is true, but does not call into question the validity of their holdings on this point. Neither case tied its constitutional holding to the standard of review it later employed, and a holding that marries the constitutional validity of the Administrative Procedure Act to judicial review using an independent judgment standard would be contrary to the decades of precedent discussed above because it would effectively make independent judgment, not substantial evidence, the default standard of review.

Pacific Oil additionally argues that its procedural due process rights were violated because the Department was not a “neutral decision maker” given that its Final Decision assessed penalties that filled its own coffers. Although due process is offended when a decision-maker has a “direct pecuniary interest” in the decisions it makes (*Tumey v. Ohio* (1927) 273 U.S. 510, 535 [mayor serving as judge has incentive to issue higher fines to help his own village]; *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 59-60

[same]), this prohibition does not apply when a state agency is making decisions and imposing penalties under its enabling act and using the procedures set forth in the Administrative Procedure Act. Indeed, if due process prohibited such practices, administrative agencies in the State of California would be either barred from participating in the enforcement of their own rules or from assessing penalties for noncompliance with those rules. This is not the law.

Pacific Oil has also not stated a claim for relief under substantive due process. As we conclude in our review of the trial court's writ order, the Department's assessment of penalties was not in error. Consequently, the Department's order does not rise to the level of an "outrageous or egregious" error that would violate substantive due process.

Pacific Oil has not stated a claim for a violation of equal protection as well. Where, as here, a plaintiff has alleged an equal protection violation involving just itself (a so-called "class of one"), the plaintiff must prove that (1) it was "treated differently than other similarly situated persons," (2) "the different treatment was intentional," and (3) "there was no rational basis for the difference in treatment." (*Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 594.) As set forth in the FAC, the gravamen of Pacific Oil's equal protection claim is that the Department is treating it differently than other hazardous waste transporters using leased employees as drivers. However, the premise of this argument is refuted by the Department's Final Decision, which concludes (properly, as we hold today) that Pacific Oil was *not* using a leased employee as a driver. Thus, Pacific Oil is not being treated differently from other transporters using leased drivers and the Department has a rational basis for treating Pacific Oil differently than those other transporters.

Pacific Oil urges that it is entitled to litigate its due process and equal protection claims *because* they were not litigated in the administrative proceedings and because a finding in its favor will not necessarily invalidate those proceedings. We reject that argument for three reasons.

First and foremost, we have already concluded that Pacific Oil's allegations are insufficient as a matter of law; their relationship to the administrative proceedings do not undermine that conclusion.

Second, Pacific Oil's decision not to raise its constitutional challenges in the administrative proceedings is not a reason to allow these claims to go forward; to the contrary, it is an additional reason to deny them because it means that Pacific Oil has not exhausted its administrative remedies, and this failure to exhaust precludes us from reaching the merits of those challenges. Constitutional challenges that do not attack an agency's operating statute must generally be first raised in the proceedings before the administrative tribunal. (*Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 91 ["when an administrative tribunal has been created to adjudicate an issue, the matter must be presented there before any resort is made to the courts"]; *San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1462, fn. 5 [same]; *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 984-985 ["resort to the administrative remedy was required even though the statute sought to be applied and enforced by the administrative agency was challenged upon constitutional grounds"]; cf. *Veta*, *supra*, 12 Cal.3d at p. 251 [exhaustion not required for challenge to "the constitutionality of the basic statute under which [an agency] operates"]; *Andal*, at pp. 91-92 [exhaustion not required for "comprehensive constitutional challenge to the Ordinance's validity"]; *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 276 ["constitutional challenges . . . to the application of an administrative statutory scheme" must "typically" be "presented to the administrative agency in the first instance," although "important questions of constitutional law . . . governing agency authority" may be exempt].) The failure to do so bars a judicial tribunal from considering the constitutional challenge for the first time. (*City of Santee*, *supra*, 228 Cal.App.3d at pp. 718-719.) Pacific Oil's constitutional challenges turn on the Department's application of the law to the facts *in this case*; as such, they do not level a broader attack on the Department's power to act or the legitimacy of the Hazardous Waste Control Act. Pacific Oil was required to administratively exhaust its constitutional claims, and its failure to do so precludes us from addressing the issue.

Lastly, a ruling in Pacific Oil's favor *would* invalidate the Department's ruling. A successful procedural due process ruling would rest on a finding that the procedures followed in this case were fundamentally unfair, and

would all but mandate that we vacate the Department’s decision upholding its Enforcement Order. A successful substantive due process ruling would be rest on a finding that the Department’s ruling was “outrageously or egregiously” wrong, which necessarily suggests it was invalid. And a successful equal protection challenge would rest on a finding that De Leon *was* a leased employee, which is irreconcilable with the Department’s factual finding that he was not.

B. Reasonable probability of amendment

Pacific Oil argues that the trial court erred in sustaining the Department’s demurrer without leave to amend because it can (1) allege a violation of our State’s “takings clause” because the Department’s ruling interfered with Pacific Oil’s contract with Botavia to employ De Leon as a “leased employee” (e.g., *Palmyra Pacific Seafoods, L.L.C. v. U.S.* (Fed.Cir. 2009) 561 F.3d 1361, 1365 [“contract rights can be the subject of a takings action”]), and that takings claims need not be administratively exhausted (*Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1178); and (2) re-allege an intentional interference with a contract claim premised on the Department’s interference with that contract. The factual predicate of either claim, however, is that there exists a valid contract between Botavia and De Leon denominating De Leon as a “leased employee” of Pacific Oil. This is contrary to the finding of the Department in its Final Decision, which we have affirmed today. Although the Department’s ruling is not, as of today, final for purposes of res judicata because it is still subject to further review by way of a petition for review to our Supreme Court, the Department’s ruling is now law of the case with respect to any further proceedings between Pacific Oil and the Department on this issue. (*Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 957 [“[t]he doctrine of law of the case gives finality to appellate decisions, precluding courts from revisiting issues that have been determined in earlier appellate proceedings between the same parties”]; see also *Hanna v. City of Los Angeles* (1989) 212 Cal.App.3d 363, 376-377 [the law of the case doctrine “applies to appellate determinations that the trial court’s factual findings are supported by substantial evidence”], overruled in part on other grounds by *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.) Thus, the trial court cannot come to a

conclusion different than ours, making remand for further amendment of the FAC pointless. Furthermore, allowing Pacific Oil to amend its claim on remand would violate the one-judge rule by requiring the trial court on remand to sit in judgment of the ruling of the trial court in the writ proceeding. (See *In re Alberto*, *supra*, 102 Cal.App.4th pp. 427-428.) In light of this analysis, we need not reach Pacific Oil's remaining arguments on these claims.

DISPOSITION

The judgments are affirmed. The Department is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ